an offence punishable under section 5(2) of the National Service Ordinance, 1952. Evidence was given on his behalf by a priest, that a Joseph Tsai had been baptised, but there was no conclusive proof that the name referred to the appellant. The learned magistrate convicted the appellant on the ground that he had not rebutted the prosecution evidence.

Held: the learned magistrate had misdirected himself on the burden of proof. The burden is always on the prosecution to prove beyond reasonable doubt that the accused person is guilty of an offence as charged and an accused person would be entitled to an acquittal if he succeeded in raising a reasonable doubt in the mind of the trial court. The learned magistrate should have given the benefit of the doubt to the appellant as the person Joseph Tsai in the baptism certificate might in all probability be the appellant.

MAGISTRATE'S CRIMINAL APPEAL.

Chew Kok Chooi for the appellant.

Ajaib Singh (Deputy Public Prosecutor) for the respondent.

Azmi C.J. (Malaya): This is an appeal against the judgment of the magistrate at Kuala Lumpur. He convicted the appellant on the following charge:—

"That you on the 9th April, 1965 being a person affected by a notice given under sub-section (1) of section 5 vide L.N. No. 320/63 dated 23.11.63 without lawful excuse did fail to present yourself for registration in accordance with the said notice and that you thereby committed an offence punishable under section 5(2) of the National Service Ordinance 37 of 1952."

The facts of the case may be summarised as follows. The appellant wished to go to Japan and on 7th April 1965 he wrote to the proper authority under the National Service Ordinance for an exit permit. In that application he said among other things "Due to age miscalculation, I have not registered in the National Service, should further notice which require for registration, I shall be happy to do so," and in his application for the exit permit he stated that he was born in 1935.

When an officer in the department of National Service found out that the appellant was born 1935 and therefore subject to be called for service he made a report to the police. Subsequently the appellant was brought before the court and charged as above.

The appellant's name according to the application and identity card is Chay Hon Song. At the trial the appellant said that in January 1964 he went to a registration centre at the Cochrane Road School and when he presented his national registration identity card he was told that he was too old for service. His mother gave evidence on his behalf and said that the appellant was her eldest son and that he was born on 20th July 1933 and not in 1935 as stated in the national registration identity card, and that the appellant's name was Joseph Tsai which apparently is another way of spelling the word Chay. The Rev. Father Gurand, a priest at the Holy Rosary Church, Brickfields, Kuala Lumpur, affirmed that according to the register of baptisms, the appellant's mother did register and obtained a certificate of baptism in reference to her son Joseph Tsai but he himself of course could not say whether the appellant was the same Joseph Tsai.

The appellant's mother also stated that she had three sons and appellant was her eldest son.

The learned magistrate in his judgment after referring to the evidence of the priest emphasised the fact that according to the priest, Joseph Tsai to quote the actual words "may be the name of the defendant" and then the learned magistrate went on to say "There is no conclusive proof that the name Joseph Tsai refers to defendant and no one else" though subsequently he referred to the evidence of appellant's mother and to her evidence that the date of the birth of the appellant in the identity card may be wrong due to her mistake. The learned magistrate also went on to say that no attempt had been made by the defence to tender an extract of the birth certificate of the appellant to prove the correct age and again no evidence was offered to corroborate the appellant's attempt to register for national service at the Cochrane Road centre and that he was rejected by the authorities and the appellant, therefore, according to the learned magistrate, had not rebutted the prosecution evidence and had not explained why the date of birth stated in his application for the permit was wrong.

In my view the learned magistrate had misdirected himself on the burden of proof. It has, I think, been said again and again that the burden is always on the prosecution to prove beyond reasonable doubt that the appellant is guilty and that the appellant would be entitled to an acquittal if he succeeded in raising a reasonable doubt in the mind of the trial court. In other words, it is not necessary that the defence must convince the court, nor need the defence evidence be conclusive.

For the above reason, in my view, the learned magistrate should have given the benefit of the doubt to the appellant on the ground that the person Joseph Tsai in the baptism certificate may in all probability be the appellant.

Appeal allowed.

Solicitors: *Donaldson & Burkinshaw.*

AHMAD BIN ALI v. PUBLIC PROSECUTOR

[A.Cr.J. (Ong Hock Sim J.) December 28, 1966]

[Penang — Criminal Appeal No. 19 of 1966]

Penal Code, ss. 441 and 445 — House-breaking — Criminal trespass — Entry upon property to persuade girl in house to slip out and hold a tete-a-tete — Whether an offence.

In this case the appellant had been convicted of house-breaking by night. It appeared that he entered the house to persuade a girl to slip out and hold a *tete-a-tete* with him.

Held: the act of the appellant in this case was not an offence within the meaning of section 441 of the Penal Code and therefore the conviction of the appellant must be set aside.

Case referred to:—

(1) *Abbass* v. *Tomby* (1881), 3 Kyshe 131.

MAGISTRATE'S CRIMINAL APPEAL.

Mustapha bin Hussain for the appellant.

Haji Suhaimi bin Dato' Kamaruddin (Deputy Public Prosecutor) for the respondent.

Ong Hock Sim J.: The appellant was convicted by the learned magistrate at Nibong Tebal on a charge of house-breaking by night and sentenced to a term of 4 months imprisonment.

From the first information report and the evidence of the complainant, the motive for the entry was to persuade the girl to slip out and hold a *tete-a-tete*. The manner of the entry and the hour were improper and indiscreet. Instead of coming out with the truth, the appellant tried to lie his way out and to induce his friends to support his *alibi* by perjured evidence. I see he has now abandoned his appeal against conviction and has only appealed against sentence. His line of defence in the court below does not dispose me to show him any leniency.

I have however to consider whether the offence as charged has been committed. House-breaking is defined as house-trespass if entry is effected in any of the six ways set out in section 445 of the Penal Code or if being in the house for the purpose of committing an offence or having committed an offence therein egress is effected in any such ways. House-trespass is defined as criminal trespass in any building, tent or vessel used as a human dwelling or any building used as a place of worship or as a place for the custody of property. This takes us to the definition of criminal trespass in section 441 which is entry upon property with intent to commit an offence or to intimidate, insult or annoy any person in possession thereof or having lawfully entered thereon unlawfully remaining there with the like intent. I would refer to the case of *Abbas* v. *Tomby* [1] where it was held that the act of a person in going into the house of another with intent to have criminal intercourse with the latter's wife, although necessarily resulting in annoyance or as an insult to the latter is not an offence within sections 441 and 442 of the Penal Code.

I consider that this case is not distinguishable as the intent for the entry into the house by the appellant was not for any of the purposes set out in section 441.

I therefore set aside the conviction and sentence.

Conviction and sentence set aside.

ABAS v. HAJJAH SAELAN

[A.C.J. (Ismail Khan J.) December 31, 1966]

[Seremban — Civil Appeal No. 6 of 1961]

Malay Customary Law — Adat Perpateh — Whether property harta pembawa or harta charian laki-bini — Proof of custom.

This was an appeal against a distribution order made by the Collector of Land Revenue, Kuala Pilah, in the estate of one Yusof bin Jadi (deceased). The collector held that the property was *charian laki-bini* and relying on a statement in *Taylor's* Customary Law of Rembau he held that the respondent, the widow of the deceased, was entitled to the whole of the property. The appellant, a son of the deceased by another wife since deceased, appealed against the decision.

Held: (1) the collector should have ascertained the date of the marriage of the respondent to the deceased in order to decide whether the property was a *harta pembawa* or *charian laki-bini;*

(2) the custom may differ from State to State and district to district and the collector should have ascertained what was the custom applying in Kuala Pilah, instead of applying the custom in Rembau;

(3) there should therefore be an order remitting the case to be heard before another collector.

CIVIL APPEAL.

R. Muthu-Ramalingam for the appellant.

Edgar Joseph Jr. for the respondent.

Ismail Khan J.: This is an appeal against the distribution order made by the Collector of Land Revenue dated 24th November, 1960, in the estate of one Yusof bin Jadi, deceased, comprising two pieces of land E 2006 and 2723 Juasseh, Kuala Pilah.

The deceased left him surviving his widow Hajjah Saelan binte Owit and the appellant Abas bin Yusof, a son by another wife since deceased.

At the hearing of the application for distribution, it was admitted by the appellant that the land E 2723 was acquired by the deceased after his marriage to the respondent. He claimed however, that the other piece of land E 2006 is a *pembawa,* that is, the property brought by the deceased to the tribe of his wife on marriage. The respondent alleged that it is *charian laki-bini,* that is, property acquired during coverture. It is necessary to establish the category of the property as on this depends the question whether it reverts to the beneficiaries and is to be distributed according to the rules of ancestral property in the case of the *pembawa,* or is transmitted to the widow and children of the the marriage if it is *charian laki-bini.* (See E. N. *Taylor* on Customary Law of Rembau — p. 15).

According to the collector, the land was